BRB No. 13-0287 BLA

DELBERT PENNINGTON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATES CONTRACTING & CONSTRUCTION, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/25/2014
KENTUCKY EMPLOYERS MUTUTAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (10-BLA-5438) of Administrative Law Judge Stephen M. Reilly awarding benefits on a claim filed on June 5, 2009 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

After crediting claimant with 23.42 years of coal mine employment,[2] and finding that claimant smoked at least a pack of cigarettes a day for forty-four years, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3] After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge, therefore, found that claimant affirmatively established his entitlement to benefits under 20 C.F.R. Part 718. In addition, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did

[1] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Black Lung Benefits Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Unless otherwise indicated, the relevant version of all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] The record indicates that claimant's coal mine employment was in Kentucky. Hearing Transcript at 11. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting that the administrative law judge failed to adequately explain his basis for crediting claimant with the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. However, the Director argues that a remand is not necessary since the administrative law judge's determination, that claimant affirmatively established her entitlement to benefits under 20 C.F.R. Part 718, may be affirmed.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[5] Employer does not challenge the administrative law judge's determination of 23.42 years of coal mine employment, his finding that claimant smoked at least a pack of cigarettes a day for forty-four years, or his findings that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and total disability pursuant to 20 C.F.R. §718.204(b)(2). Those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In evaluating whether claimant established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Baker, Rosenberg, and Jarboe. Dr. Baker diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, due to both coal mine dust exposure and smoking. Director's Exhibit 14. Conversely, Drs. Rosenberg and Jarboe opined that claimant does not suffer from legal pneumoconiosis. Although Dr. Rosenberg diagnosed COPD, and Dr. Jarboe diagnosed chronic bronchitis and emphysema, they opined that these diseases were due entirely to cigarette smoking. Employer's Exhibits 1B, 5.

The administrative law judge credited Dr. Baker's diagnosis of legal pneumoconiosis, finding that the doctor's opinion that claimant's COPD was due to both coal mine dust exposure and smoking was consistent with the preamble to the revised regulations which acknowledges the prevailing view of the medical community that the risks of smoking and coal mine dust exposure are additive. Decision and Order at 13, *citing* 65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000). The administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Jarboe because he found that the doctors based their opinions on assumptions contrary to the regulations. Decision and Order at 13. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Employer contends that the administrative law judge erred in his consideration Dr. Baker's opinion. Employer specifically argues that Dr. Baker's diagnosis of COPD cannot support a finding of legal pneumoconiosis because the doctor opined that smoking was the primary cause of claimant's obstructive impairment. Assuming a coal mine employment history of forty-three years and a smoking history of eighteen to nineteen pack-years, Dr. Baker explained, in a June 27, 2009 medical report, that both exposures can cause pulmonary symptoms. Director's Exhibit 14. Although Dr. Baker opined that coal mine dust exposure was the primary cause of his symptoms, the doctor noted the synergistic effect of the two exposures, and attributed claimant's COPD to both coal mine dust exposure and smoking. *Id.* Dr. Baker specifically opined that claimant's "condition has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment." *Id.*

During a subsequent deposition, Dr. Baker was asked to assume that claimant had a twenty-three year coal mine employment history and a forty pack-year smoking history. Employer's Exhibit 6 at 11. Based upon these assumptions, Dr. Baker opined that smoking would be the "primary cause" of claimant's pulmonary impairment. *Id.*

The administrative law judge found that Dr. Baker's deposition testimony did not undermine his diagnosis of legal pneumoconiosis:

> Dr. Baker found that [claimant's] impairment was caused by both his smoking history and coal dust exposure with coal dust [exposure] being a significant contributor to [claimant's] disability. Upon consideration of more accurate coal mine employment and smoking histories, Dr. Baker did not exclude coal dust [exposure] as a significant contributor, but stated that smoking would be the primary cause of [claimant's] disability. Dr. Baker did not change his opinion that coal dust [exposure] significantly contributed to [claimant's] total disability. I give greater weight to this opinion because it is consistent with [Department of Labor] policy that smoking and coal dust are additive in causing impairment.

Decision and Order at 15.

Thus, the administrative law judge found that Dr. Baker's opinion, that smoking was the "primary cause" of claimant's pulmonary impairment, did not undermine the doctor's opinion that claimant's coal mine dust exposure was also a significant contributor. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). The Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is based on substantial evidence, we affirm the administrative law judge's determination that Dr. Baker's opinion supports a finding of legal pneumoconiosis.

Both Drs. Rosenberg and Jarboe eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because they found a disproportionate decrease in claimant's FEV1, compared to his FVC, a characteristic that they opined was uncharacteristic of a coal mine dust-induced lung disease.[6] The

[6] Dr. Rosenberg opined that claimant's coal mine dust exposure was not the cause of his pulmonary impairment because claimant's pulmonary function studies indicated a reduced FEV1/FVC ratio, and not a preserved FEV1/FVC ratio. Employer's Exhibit 1B. Although Dr. Rosenberg noted that he agreed with the Department of Labor that "COPD may be detected by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal [coal workers' pneumoconiosis]." *Id*. Dr. Jarboe excluded coal mine dust exposure as a cause of claimant's impairment, and related it to smoking, because the results of claimant's pulmonary function studies indicated a disproportionate reduction of FEV1 to FVC. Employer's Exhibit 5.

administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Jarboe, because he found that this view was contrary to the regulations. Decision and Order at 13, 15; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio."). Because employer does not challenge the administrative law judge's basis for according less weight to the opinions of Drs. Rosenberg and Jarboe, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer also argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge credited Dr. Baker's opinion, that claimant's coal mine dust exposure "significantly contributed to" his pulmonary impairment, again finding that the doctor's opinion was consistent with the science credited by the Department of Labor demonstrating that smoking and coal dust exposure are additive in causing impairment." Decision and Order at 15, *citing* 65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000); Director's Exhibit 14. The administrative law judge questioned the contrary opinions of Drs. Rosenberg and Jarboe, that claimant's pulmonary impairment was not due to his coal mine dust exposure, but entirely due to smoking, because he found that their opinions were "contrary to the regulations." Decision and Order at 15; Employer's Exhibits 1B, 5.

Employer argues that the fact that Dr. Baker attributed claimant's pulmonary impairment primarily to cigarette smoking precludes a find that claimant's coal mine dust exposure could also be a substantially contributing cause of his pulmonary impairment. We disagree. As we previously discussed in affirming the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge permissibly found that Dr. Baker's opinion, that smoking was the "primary cause" of claimant's pulmonary impairment, did not undermine the doctor's opinion that claimant's coal mine dust exposure was also a significant contributor to that impairment. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626. The administrative law judge, therefore, permissibly determined that Dr. Baker's opinion supported a finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Employer does not challenge the administrative law judge's basis for according less weight to the opinions of Drs. Rosenberg and Jarboe. We, therefore, affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In light of our affirmance of the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding of entitlement pursuant to 20 C.F.R. Part 718.[7]

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[7] In light of our affirmance of the administrative law judge's award of benefits under 20 C.F.R. Part 718, we need not address employer's contention that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).